

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 13, 2009

STATE OF TENNESSEE v. WILLIAM C. OSBORNE, JR.

Appeal from the Circuit Court for Lawrence County
No. 25090 Stella Hargrove, Judge

No. M2008-00988-CCA-R3-CD - Filed May 7, 2009

Appellant, William C. Osborne, Jr., appeals the trial court's denial of his Rule 35 Motion for Reduction of Sentence. Appellant pled guilty in 2006 to attempted second degree murder, theft of property, and vandalism. The plea agreement specified that he was to receive consecutive terms of eight years, four years, and three years, for a total effective sentence of fifteen years. The trial court suspended the sentence and placed Appellant on intensive probation. After the violation of Appellant's probation in August of 2007, Appellant filed a motion for correction or reduction of sentence pursuant to Rule 35 of the Tennessee Rules of Criminal Procedure. The trial court denied the motion, finding that Appellant was a violent criminal. We determine that the trial court properly denied the motion. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Sharon D. Aizer, Assistant Public Defender, Columbia, Tennessee for the appellant, William C. Osborne, Jr..

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilbur, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

In February 2005, [Appellant] drove a stolen pickup truck into the rear of his wife's car, pushing the car into the interior of a rental home and pinning her against a wall. Thereafter, a Lawrence County grand jury charged [Appellant] with attempted first degree murder, Class D felony theft, and Class C felony vandalism.

On March 8, 2006, [Appellant] pled guilty to attempted second degree murder, theft of property . . . , and vandalism. . . . Pursuant to the terms of the plea agreement, he received consecutive terms of eight years, four years, and three years respectively, resulting in a total effective sentence of fifteen years. The sentence was suspended, and [Appellant] was placed on intensive probation.

A probation violation warrant was issued on June 12, 2007. According to the warrant [Appellant's] probation officer sought to revoke [Appellant's] probation because he tested positive for cocaine on May 16, 2007, and was in possession of cocaine on the same date.

On August 7, 2007, a probation revocation hearing was held. Angela Harlan, [Appellant's] probation officer, testified that she was assigned to supervise [Appellant]. Harlan administered [Appellant] a random drug test on May 16, 2007, and cocaine was found in [Appellant's] system. When asked to explain the positive cocaine result, [Appellant] assured Ms. Harlan that he had not used cocaine.

A second drug screen . . . was taken thirteen days later on May 29, 2007. The test again revealed evidence of cocaine use.

State v. William C. "Bunky" Osborne, Jr., No. M2007-02005-CCA-R3-CD, 2008 WL 4791527, at *1 (Tenn. Crim. App., at Nashville, Nov. 4, 2008), *perm. app. denied*, (Tenn. Mar. 16, 2009) (footnote omitted). Appellant initially denied the use of cocaine but later admitted in letters to his probation officer that he used cocaine. *Id.* at *2. The trial court revoked Appellant's probation and reinstated his original fifteen-year sentence. On appeal, Appellant argued that the evidence introduced at the hearing did not support the full revocation of his probation. *Id.* This Court affirmed the revocation on appeal, finding that the trial court "neither erred nor abused its discretion in revoking [Appellant's] probation." *Id.* at *3.

Appellant subsequently filed a motion for correction or reduction of sentence under Rule 35 of the Tennessee Rules of Criminal Procedure. Appellant asked the trial court to "correct or reduce" the sentence imposed after the revocation of probation.

The trial court held a hearing on the Rule 35 motion. At the hearing, Appellant presented his brother, Edward Osborne, as the only witness. Mr. Osborne testified that Appellant lived with him in Rutherford County near LaVergne when he was first released on probation. Appellant lived at Mr. Osborne's home for approximately thirteen or fourteen months before he bought a trailer and moved to a place nearby. The Appellant "got hooked up with the wrong friends" and tested positive for drug use during one of the drug screens. Mr. Osborne thought that Appellant was trying to get his GED and had attempted to gain access to a drug treatment program. Appellant told Mr. Osborne that he had not started treatment yet because there was a long waiting list for treatment.

At the conclusion of the hearing, the trial court determined that Appellant was a “violent offender.” The trial court noted that when Appellant “walked out of the courtroom” after his guilty plea he was a “free man” who was “given the privilege of probation and he messed that up.” The trial court applauded the efforts that Appellant was making while in custody but denied relief under Rule 35. Appellant filed a timely notice of appeal.

Analysis

Appellant argues on appeal that the trial court improperly denied his application to modify his sentence. Specifically, Appellant argues that he did not “‘plea bargain’ for his probation revocation” and that the trial court actually erred in revoking probation by applying an incorrect standard and then refusing to modify that decision. The State disagrees, arguing that Appellant has not shown circumstances that would warrant a modification of his sentence.

Rule 35 of the Tennessee Rules of Criminal Procedure provides:

(a) Timing of Motion. The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.

(b) Limits of Sentence Modification. The court may reduce a sentence only to one the court could have originally imposed.

(c) Hearing Unnecessary. The trial court may deny a motion for reduction of sentence under this rule without a hearing.

Tenn. R. Crim. P. 35(a)-(c). “This rule does not vest the defendant with a remedy as of right.” *State v. Elvin Williams*, No. M2006-00287-CCA-R3-CO, 2007 WL 551289, at *1 (Tenn. Crim. App., at Nashville, Feb. 27, 2007). The Advisory Commission Comments to Rule 35 state, “The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice. The modification permitted by this rule is any modification otherwise permitted by the law when the judge originally imposed [the] sentence.” When the appellate court reviews the denial of relief on a motion to reduce or modify a sentence, the standard is whether the trial court abused its discretion. *State v. Irick*, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993).

At the time he pled guilty, Appellant entered a plea agreement with the State. Appellant pled nolo contendere to the charges in exchange for an agreed upon sentence. According to the plea agreement, the plea was entered pursuant to Tennessee Rule of Criminal Procedure 11(c)(1)(C).

Tennessee Rule of Criminal Procedure 11(c)(1) provides:

In General. The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will:

(A) move for dismissal of other charges;

(B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

Tenn. R. Crim. P. 11(c)(1).

The appellate courts of this State have analyzed the application of Rule 35 when a defendant has entered a negotiated plea and subsequently filed a motion pursuant to Rule 35. In *State v. McDonald*, 893 S.W.2d 945 (Tenn. Crim. App. 1994), this Court interpreted an unreported supreme court case which held that alteration of negotiated plea agreement sentences is limited in scope. 893 S.W.2d at 947 (citing *State v. Grady Hargrove*, Nos. 01S01-9203-CC-00035; 01S01-9203-CC-00036; 03S01-9203-CC-00026, 1993 WL 300759, at *2 (Tenn., at Nashville, Aug. 9, 1993), *reh'g denied*, (Sept. 27, 1993));¹ *see also State v. Derrell E. Bender*, No. M2005-02065-CCA-R3-CD, 2007 WL 57089, at *2 (Tenn. Crim. App., at Nashville, Jan. 5, 2007). In *McDonald* this Court held that although the success of a petition pursuant to Rule 35 in the case of a negotiated plea agreement pursuant to Rule 11(c)(1)(C) would be very limited, the limitation did not result in a waiver of a defendant's ability to file such a motion. *Id.* In addition, this Court stated that "a situation may arise where unforeseen, post-sentencing developments would permit modification of a sentence in the interest of justice." *Id.* In our estimation, Appellant had shown no proof of unforeseen, post-sentencing developments, save the violation of his own probation, that would warrant modification of his sentence. The revocation of Appellant's probation was reviewed and upheld by this Court on appeal. *William C. "Bunky" Osborne, Jr.*, 2008 WL 4791527, at *1. The trial court properly conducted a hearing pursuant to Rule 35 and determined that Appellant was not entitled to relief. We determine that the trial court did not abuse its discretion. Appellant is not entitled to relief on this issue.

¹ At the time of the decisions in *McDonald* and *Grady Hargrove*, the provisions of Tennessee Rule of Criminal Procedure 11(c)(1) appeared in subsection (e)(1).

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE